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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18 ASHLEY BUGARIN, on behalf of herself and) Case No.: 5:20-cv-03341-BLF
19 all others similarly situated,)
20 Plaintiff,) **DEFENDANT ALL NIPPON AIRWAYS**
21 vs.) **CO. LTD.'S NOTICE OF MOTION AND**
22 ALL NIPPON AIRWAYS CO. LTD.,) **MOTION TO DISMISS PLAINTIFF'S**
Defendant.) **FIRST AMENDED COMPLAINT**
) **PURSUANT TO RULES 12(b)(1),**
) **12(b)(2) AND 12 (b)(6) OF THE**
) **FEDERAL RULES OF CIVIL**
) **PROCEDURE**

) Date: October 22, 2020
Time: 9:00 a.m.
Courtroom: 3 - 5th Floor
Judge: Hon. Beth Labson
Freeman

23 PLEASE TAKE NOTICE that on October 22, 2020, at 9:00 a.m., in Courtroom 3, Fifth
24 Floor of the above captioned court, located at 280 South 1st Street, San Jose, California, 95113,
25 defendant All Nippon Airways Co., Ltd., (hereinafter referred to as "ANA"), by and through its
26 attorneys of record, Condon & Forsyth LLP, will move this Court for an order dismissing
27 plaintiff Ashley Bugarin's (hereinafter referred to as "Plaintiff") First Amended Complaint
28 against ANA pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6) of the Federal Rules of Civil

1 Procedure.

2 This motion will be based on this Notice of Motion, the Memorandum of Points and
3 Authorities below, the Declaration of Mr. Yutaka Ito (hereinafter "Ito Decl.") and any oral
4 argument presented at the hearing of this motion.

5
6 Dated: August 17, 2020

CONDON & FORSYTH LLP

7
8 By:/s/ Scott D. Cunningham

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1 **Other Authorities**

2 *See Enforcement Notice Regarding Refunds by Carriers Give the Unprecedented*
3 *Impact of the COVID-19 Public Health Emergency on Air Travel (“DOT*
4 *Notice”), <https://www.transportation.gov/sites/dot.gov/files/2020-04/Enforcement%20Notice%20Final%20April%203%202020.pdf>. (last*

5 accessed August 17, 2020).....5

6 *Frequently Asked Questions Regarding Airline Ticket Refunds Given the*
7 *Unprecedented Impact of the COVID-19 Public Health Emergency on Air*
8 *Travel, <https://www.transportation.gov/sites/dot.gov/files/2020-05/Refunds-20Second%20Enforcement%20Notice%20FINAL%20%28May%2012%202020%29.pdf> (last accessed August 17, 2020)*

8 *passim*

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

3 In response to ANA’s Motion to Dismiss her Original Complaint, Plaintiff has filed a
4 First Amended Complaint (“FAC”) for this putative class action in which she claims that ANA
5 failed to provide a refund for a flight that was canceled in response to the COVID-19 pandemic.
6 Plaintiffs’ FAC omits many of the causes of action ANA originally challenged, leaving only a
7 cause of action for breach of contract. Plaintiff also now seeks the remedy of rescission of the
8 contract. The major distinction between the original Complaint and the FAC is that the FAC
9 alleges that ANA’s Conditions of Carriage incorporate the enforcement notices published by the
10 United States Department of Transportation (“DOT”) that require airlines to provide prompt
11 refunds and ANA’s failure to do so was a breach of the Conditions of Carriage. Plaintiff claims
12 that ANA was required to provide her with an automatic refund upon the cancellation of her
13 flight. However, Plaintiff still fails to plead that she satisfied the requirements of Article 13 of
14 ANA’s Conditions of Carriage, which requires that Plaintiff submit a request for a refund and
15 supporting documentation. Pursuant to the Conditions of Carriage, this is an explicit condition
16 precedent to receipt of a refund pursuant to ANA’s Conditions of Carriage. Accordingly,
17 Plaintiff fails to state a claim for breach of contract. Furthermore, her action is premature, as she
18 has not suffered an injury-in-fact and will not unless ANA denies her a refund for her flight.
19 Accordingly, her claims fail for lack of standing and ripeness under Article III, Section 2 of the
20 United States Constitution.

21 It is ANA's policy to refund tickets for flights canceled in response to COVID-19 within
22 seven days of receiving a passenger's request for a refund, in compliance with all guidance
23 issued by the DOT. ANA has instructed its authorized travel agents to do the same. ANA has
24 acted at all times in compliance with the enforcement notices published by the DOT, the DOT
25 Frequently Asked Questions, 14 C.F.R. § 259.5(b)(5), and ANA's Conditions of Carriage. As of
26 July 20, 2020, ANA has processed 78,770 refunds of tickets issued in the United States for
27 flights canceled due to the COVID-19 pandemic. Because ANA has actively been providing
28 refunds to passengers when requested pursuant to its refund policy, the claims of the putative

1 class members are undeniably moot.

2 The FAC also fails to state a claim against ANA because Plaintiff's state law cause of
 3 action for breach of contract is preempted by the Airline Deregulation Act of 1978, 49 U.S.C. §
 4 41713(b) ("ADA"), which prohibits States from enforcing any state common law or statutes
 5 relating to rates, routes or services of any carrier. Ticket refunds are a service that ANA
 6 provides to all passengers that directly affects the price of ANA tickets. The FAC essentially
 7 requests the Court to expand ANA's contractual obligations to require ANA to provide refunds
 8 automatically to passengers, without any proof of purchase, refund request or contact with ANA
 9 whatsoever—a substantial change in ANA's refund policy which would impact ANA's rates and
 10 services. Therefore, Plaintiff's claims are preempted by the ADA.

11 Even if Plaintiff could state a claim for relief against ANA, this Court lacks personal
 12 jurisdiction over ANA. Plaintiff did not plead any facts to indicate her action arises out of or
 13 relates to ANA's contacts in California or any facts to demonstrate that ANA conducts
 14 substantial business in California such that ANA could be deemed "at home" here so as to satisfy
 15 the standard for general personal jurisdiction set forth by the United States Supreme Court in
 16 *Daimler A.G. v. Bauman*, 571 U.S. 117 (2014). Plaintiff has failed to plead facts sufficient to
 17 establish that this Court may exercise personal jurisdiction over ANA in connection with her
 18 claims, much less over those of the putative class members.

19 As such, ANA moves for an order pursuant to Rule 12(b)(1), (2) and (6), dismissing the
 20 FAC in its entirety.

21 **STATEMENT OF ISSUES TO BE DECIDED**

22 The first issue to be decided by way of this motion is whether Plaintiff has established
 23 facts sufficient to satisfy the case and controversy requirement under Article III, Section 2 of the
 24 U.S. Constitution.

25 The second issue to be decided by way of this motion is whether Plaintiff's action is
 26 preempted by the Airline Deregulation Act and whether Plaintiff has stated facts sufficient to
 27 allege a state law claim for breach of contract.

28 The third issue to be decided by way of this motion is whether Plaintiff has established

1 whether this Court has personal jurisdiction over ANA in California.

2 **STATEMENT OF RELEVANT FACTS**

3 **I. PLAINTIFF'S TICKETING AND CLAIMS**

4 On or around November 2019, Plaintiff purchased passenger tickets through online travel
 5 agent ASAP for ANA flights from San Jose, California, to Tokyo, Japan, on March 23, 2020,
 6 and from Tokyo to San Francisco, California, on April 8, 2020. (FAC, ECF No. 15, ¶ 19).
 7 Plaintiff's departing flight was operated by ANA as scheduled. (Ito Decl. ¶ 24). Plaintiff did not
 8 travel on board this flight or otherwise cancel her flight reservation prior to departure. (Ito Decl.
 9 ¶¶ 24-25). On or around April 2020, Plaintiff's return flight from Tokyo to San Francisco was
 10 canceled in response to the COVID-19 pandemic. (FAC, ECF No. 15, ¶ 19). Thereafter,
 11 Plaintiff alleges that she called ANA "several times" to request a refund for the cancelled portion
 12 of her trip, but never spoke with an ANA representative. *Id.* ANA has no record of Plaintiff
 13 requesting a refund online or contacting ANA in any way. (Ito Decl. ¶¶ 25-26). The DOT's
 14 Frequently Asked Questions, published on May 12, 2020, discussed below, state that passengers
 15 who purchased passenger tickets through online ticket agents should seek refunds from such
 16 ticket agents. *See* FAQs, No. 2. Neither Plaintiff's original Complaint nor the FAC indicate
 17 whether Plaintiff contacted ASAP for a refund of her passenger tickets. Plaintiff has not named
 18 ASAP as a defendant in this lawsuit.

19 On May 15, 2020, Plaintiff filed a class action lawsuit against ANA, only, for: (1) unjust
 20 enrichment, (2) conversion, (3) breach of contract, (4) money had and received, and (5) violation
 21 of California's Unfair Competition law. ANA filed a Motion to Dismiss all claims on July 20,
 22 2020. In response to ANA's Motion to Dismiss, Plaintiff filed the FAC which omitted many of
 23 her original claims and alleges causes of action for breach of contract and rescission.¹ In
 24 Plaintiff's original Complaint and the FAC, all causes of action alleged by Plaintiff arise out of
 25 the claim that ANA breached its Conditions of Carriage and DOT guidelines by failing to

26
 27 ¹ Though Plaintiff continues to allege she purchased the tickets from ASAP, she does not allege
 28 that she sought refunds from ASAP and ASAP has not been joined as a party to this action. It is
 possible that this is because ASAP's terms and conditions require binding arbitration as the
 exclusive means of resolving any dispute or claim against Asaptickets.com. *See*
<https://asaptickets.com/customer-service/rules-conditions> (last accessed August 17, 2020).

1 provide Plaintiff a refund for her cancelled flight.

2 **II. ANA'S TICKETING AND REFUND POLICY ACCORDING TO ANA'S**
 3 **CONDITIONS OF CARRIAGE**

4 ANA is a corporation organized under the laws of Japan with its principal place of
 5 business in Tokyo, Japan. (Ito Decl. ¶ 4). As an international carrier, prior to the COVID-19
 6 pandemic, ANA operated 118 domestic routes in Japan and 78 routes internationally. (Ito Decl.
 7 ¶ 6). Of these 196 routes that ANA operated, only five routes traveled to or from destinations in
 8 California. *Id.*

9 Individual customers in the United States seeking to purchase tickets for ANA flights
 10 generally do so by purchasing tickets directly from ANA, through authorized agents that contract
 11 with ANA, or through agents unaffiliated with ANA who work with ANA's authorized agents.
 12 (Ito Decl. ¶ 10). ASAP is not an authorized ticket agent of ANA. (Ito Decl. ¶ 11). ANA does
 13 not have a contract with ASAP authorizing ASAP to sell tickets on ANA's behalf. *Id.* ASAP
 14 obtained Plaintiff's tickets for travel on ANA flights from Downtown Travel, a separate ANA-
 15 authorized agent based in New York, and then sold the tickets to Plaintiff. (See Ito Decl. ¶¶ 17-
 16 19). ANA's refund policy is outlined in Article 13 of its Conditions of Carriage. (See ANA's
 17 Conditions of Carriage, Exhibit B to Ito Decl.). Article 13(A) provides for voluntary and
 18 involuntary refunds. *Id.* Article 13(C) defines involuntary refunds as "any refund made when a
 19 Passenger is prevented from using the Carriage provided in his/her ticket resulting from [when]
 20 ANA cancels the flight . . . and the amount of the refund shall be . . . if no portion of the trip has
 21 been made, an amount equal to the fare paid." *Id.* Article 13(B)(1) states, "ANA will make a
 22 refund to the person named in a Ticket or, to the person who purchased the Ticket *upon*
 23 *presentation to ANA of satisfactory evidence* that he/she is entitled by these Conditions of
 24 Carriage to such refund." *Id.* (*emphasis added*). Article 13(B)(3) elaborates: "ANA will make a
 25 refund only if all unused Flight Coupons and a Passenger Coupon or Passenger Receipt (or, in
 26 the case of an Electronic Ticket, the itinerary/Receipt) are surrendered to ANA." *Id.* ANA's
 27 refund procedure for cancellations due to irregularities outside of ANA's control is outlined on
 28

1 ANA's website.² ANA has also published an additional page³ outlining the procedure for
 2 refunds specifically due to COVID-19. At all times relevant to this claim, both websites stated
 3 that customers seeking refunds of tickets purchased through a travel agency should contact such
 4 agencies prior to contacting ANA for a refund, which comports with the DOT guidelines
 5 discussed *infra* at Section III. (Ito Decl. ¶ 22, 27). ANA has instructed its authorized travel
 6 agents to issue refunds in accordance with its refund policy and, where ANA is in receipt of the
 7 travel funds, has agreed to reimburse its authorized travel agents for these refunds. (Ito Decl. ¶
 8 23).

9 **III. DOT GUIDELINES IN RESPONSE TO COVID-19 AND ANA'S
 10 COMPLIANCE**

11 On April 3, 2020, in response to a high volume of complaints regarding cancelled flights
 12 as a result of COVID-19, the DOT released a Notice stating the Aviation Enforcement Office
 13 would view any contract of carriage or airline policy that denied refunds to passengers following
 14 cancellation of a flight as a violation of the carrier's obligation that could be subject to an
 15 enforcement action. *See Enforcement Notice Regarding Refunds by Carriers Give the*
 16 *Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel* ("DOT
 17 *Notice*"), <https://www.transportation.gov/sites/dot.gov/files/2020-04/Enforcement%20Notice%20Final%20April%203%202020.pdf>. (last accessed August 17,
 18 2020).

19 On May 12, 2020, the DOT clarified its views in its published Frequently Asked
 20 Questions, which stated that the Aviation Enforcement Office would focus its enforcement
 21 actions on instances where carriers disregarded the requirement to offer refunds, failed to honor
 22 its refund policies, or its refund policies were deemed "unfair or deceptive" under 49 U.S.C. §
 23 41712. *See Frequently Asked Questions Regarding Airline Ticket Refunds Given the*
 24 *Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel* ("FAQs"),
 25 <https://www.transportation.gov/sites/dot.gov/files/2020-05/Refunds->

27 ² *See* <https://www.ana.co.jp/en/id/serviceinfo/international/information/refund2.html> (last
 28 accessed August 17, 2020).

29 ³ *See* <https://www.ana.co.jp/en/jp/topics/notice200123/> (last accessed August 17, 2020).

1 [%20Second%20Enforcement%20Notice%20FINAL%20%28May%2012%202020%29.pdf](#) (last
 2 accessed August 17, 2020). The DOT clarified that where passengers purchased airline tickets
 3 from online travel agencies, such agencies were required to make the proper refunds if flight
 4 service could not be performed as contracted pursuant to 14 CFR § 399.80(1). FAQs, No. 3. In
 5 addition, the FAQs explained that the prior Notice was intended to provide guidance and did not
 6 have “the force and effect of law and is not meant to bind the regulated entities in any way.” *Id.*
 7 at ¶ 2. ANA respectfully requests that this Court take judicial notice of the DOT Notice and
 8 FAQs pursuant to Rule 201 of the Federal Rules of Evidence. The Court may take judicial
 9 notice of these guidelines as they are issued by a government entity and are a matter of public
 10 record, and the contents of the document cannot reasonably be questioned or disputed. *Lee v.*
 11 *City of Los Angeles*, 250 F. 3d 668, 689 (9th Cir. 2001). The documents are furthermore the
 12 subject of allegations in Plaintiff’s FAC and can be considered by the Court here. *Id.*

13 Notably, both the DOT Notice and the FAQs acknowledge the unprecedented nature of
 14 the COVID-19 pandemic and the significant volume of refund requests resulting therefrom. The
 15 DOT indicated that it would use its discretion and not take action against airlines “if, under the
 16 totality of the circumstances, they are making good faith efforts to provide refunds in a timely
 17 manner.” *See* FAQs, No. 6. In the wake of the COVID-19 pandemic, it has been ANA’s
 18 practice to send cancellation notices with refund instructions via email to all passengers who
 19 have purchased tickets directly from ANA. (Ito Decl. ¶ 27). Where bookings have been made
 20 through an agent, a similar cancellation notice is provided to the travel agency so that they can
 21 contact the passenger. *Id.* In compliance with the DOT Notice and FAQs, ANA has consistently
 22 provided refunds to passengers with tickets issued in the United States within seven days of
 23 receiving refund requests and instructed its authorized travel agents to do the same. ANA has
 24 processed at least 78,770 refunds of U.S. issued tickets prior to the filing of this motion. (Ito
 25 Decl. ¶ 29).

26 //

27 //

28 //

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE NOT JUSTICIALE PURSUANT TO ARTICLE III OF THE UNITED STATES CONSTITUTION AND SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Federal subject matter jurisdiction is limited to actual cases and controversies. *U.S.C.A.* *Const. Art. 3, § 2, cl. 1.* The party asserting subject matter jurisdiction bears the burden of proving its existence. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Accordingly, where a plaintiff fails to demonstrate standing or that the asserted claims are ripe for adjudication and not moot, a Rule 12(b)(1) motion to dismiss is appropriate. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). When evaluating a Rule 12(b)(1) motion, the court must evaluate whether the challenge is facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). If the challenge is a facial attack, the court must evaluate the motion on the basis of the allegations in the complaint and judicially noticed facts in the light most favorable to the plaintiff. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038 (9th Cir. 2004). However, because a factual challenge attacks allegations underlying the assertion of jurisdiction, in such instances, the Court may consider competing facts and evidence without converting the motion to dismiss into a motion for summary judgment. *Id.*

Plaintiff's claims are based upon the allegation that ANA breached its contract with Plaintiff when it failed to provide her with a refund for her cancelled flight pursuant to ANA's Conditions of Carriage. Specifically, Plaintiff cited provisions of ANA's Conditions of Carriage stating ANA will act in accordance with Applicable Laws, defined as "such laws, cabinet orders and ministerial ordinances and other government regulations, rules orders, demands or requirements" and alleges that ANA breached its contract by failing to abide by the DOT enforcement notices which qualify as "Applicable Laws."⁴ (FAC, ECF No. 15, ¶ 14). Just as with Plaintiff's original Complaint, the FAC artfully omits the provision of the Conditions of

⁴ Plaintiff fails to explain how the DOT enforcement notices constitute “Applicable Laws,” or how the DOT enforcement notices are incorporated into a contract that was entered into many months before the DOT enforcement issues were even issued. Thus, these are merely conclusory allegations.

1 Carriage that clearly states that ANA requires a request for a refund and documentation from a
 2 passenger prior to disbursing a refund. (See Conditions of Carriage Article 13(B), Exhibit B to
 3 Ito Decl.). The DOT enforcement notices do not indicate that such requirement prior to
 4 disbursement of prompt refunds is unreasonable, unlawful or otherwise prohibited.

5 The FAC fails to allege that Plaintiff submitted any request for a refund to ANA or the
 6 travel agent that issued the ticket or that she provided the requisite documentation to ANA or the
 7 travel agent that issued the ticket. As such, Plaintiff's claim that she has sustained an injury is
 8 speculative because she has failed to allege that she fulfilled a mandatory condition precedent to
 9 the issuance of a refund under the explicit terms of the Conditions of Carriage. Without an
 10 injury in fact, Plaintiff lacks standing and all claims based upon this breach of contract theory are
 11 unripe for litigation. Furthermore, because ANA has provided prompt refunds within seven days
 12 of receipt of refund requests and proofs of ticket purchase and has instructed its authorized
 13 agents to do the same, claims of putative class members are undeniably moot.

14 **A. Plaintiff's FAC Cannot Establish Standing or Ripeness Where Pled Facts are
 15 Insufficient to Allege ANA Breached Any Contractual Obligation to Plaintiff**

16 The irreducible minimum of Article III standing consists of three elements: the plaintiff
 17 must have: (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of
 18 the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v.*
19 Defenders of Wildlife, 504 U.S. 555, 560 (1992). To establish injury in fact required for Article
 20 III standing, a plaintiff must show that he or she suffered an invasion of a legally protected
 21 interest that is concrete and particularized and actual or imminent, not conjectural or
 22 hypothetical. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Concreteness requires a *de
 23 facto*, or existing, injury. *Id.* at 1547. An injury is imminent if the threatened injury is "certainly
 24 impending, or if there is a substantial risk that the harm will occur." *Montana Envtl. Info. Ctr. v.
 25 Stone-Manning*, 766 F.3d 1184, 1189 (9th Cir. 2014).

26 Whereas standing is concerned with whether a plaintiff is the proper party to litigate the
 27 matter, ripeness addresses when the litigation may occur. *Stormans, Inc. v. Selecky*, 586 F.3d
 28 1109, 1122 (9th Cir. 2009). There are two types of ripeness: (1) constitutional and (2)
 prudential. *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1123 (9th Cir. 2009).

1 Constitutional ripeness squarely coincides with the injury-in-fact prong of the standing analysis
 2 and requires plaintiffs to present “concrete legal issues, presented in actual cases, not
 3 abstractions.” *Workers v. Mitchell*, 330 U.S. 75, 89 (1947); *see also Stormans*, 586 F.3d at 1122.
 4 Prudential ripeness requires courts to evaluate the fitness of the issues for judicial decision
 5 without further factual development and the hardship to the parties of withholding court
 6 consideration. *Abbot Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). A case is not ripe
 7 “where the plaintiff has not yet suffered an immediate and certain injury because the underlying
 8 dispute hangs on future contingencies that may or may not occur.” *Clinton v. Acequia, Inc.*, 94
 9 F.3d 568, 571, 572 (9th Cir. 1996).

10 Here, Plaintiff claims that she sustained an injury-in-fact when ANA did not provide a
 11 refund to Plaintiff for her cancelled flight. (FAC, ECF No. 15, ¶¶ 11, 44). However, Plaintiff’s
 12 alleged loss of ticket funds cannot be characterized as an actual or imminent injury because
 13 Plaintiff has not pleaded that she requested a refund from ANA or her travel agent, ASAP. ANA
 14 has no record of Plaintiff submitting an online request through ANA’s website or telephonic
 15 request through ANA’s customer service line. (Ito Decl. ¶¶ 25-26). The FAC affirmatively
 16 alleges that she never spoke to an ANA representative. (FAC, ECF No. 15, ¶ 19). When ANA
 17 receives requests for refunds and proof of ticket purchase from passengers whose flights have
 18 been canceled in connection with the COVID-19 pandemic, it is ANA’s practice to provide
 19 prompt refunds within seven days, in line with the DOT’s guidance. (Ito Decl. ¶ 27). ANA has
 20 instructed its travel agents to do the same. (Ito Decl. ¶ 23). Because Plaintiff has not been in
 21 contact with ANA to request a refund and has not alleged that she has contacted her travel agent
 22 and been denied a refund, Plaintiff’s injury is hypothetical unless and until ANA denies
 23 Plaintiff’s request and fails to provide a refund. Since ANA has been actively providing refunds,
 24 there is no substantial risk that this injury will occur. Therefore, Plaintiff’s claims against ANA
 25 fail for lack of standing.

26 For similar reasons, Plaintiff’s claims are not constitutionally ripe for adjudication. In
 27 order for her breach of contract claim to be ripe, Plaintiff’s contract with ANA, based upon
 28 ANA’s Conditions of Carriage, which constitutes the contract between ANA and its passengers

1 (see *Robinson v. Am. Airlines, Inc.*, 743 F. App'x 233, 235 (10th Cir. 2018), cert. denied, 139 S.
2 Ct. 843, 202 L. Ed. 2d 582 (2019)), must have already been breached. *See Romano v. Rockwell*
3 *Intl'l*, 14 Cal. 4th 479, 488 (1996) (holding that a claim for breach of contract does not accrue
4 before the time of breach). Article 13(B) of ANA's Conditions of Carriage explicitly states that
5 refunds are provided "upon presentation to ANA of satisfactory evidence that he/she is entitled
6 by these Conditions of Carriage to such refund." (See ANA's Conditions of Carriage, Exh. B to
7 Ito Decl.). ANA is under no obligation by the DOT guidelines or otherwise, to issue refunds in
8 an automatic fashion or prior to the receipt of satisfactory evidence under Article 13(B).
9 Therefore, Plaintiff's breach of contract claim is constitutionally unripe, as it is based on the
10 future contingency that ANA or Plaintiff's travel agent will not refund Plaintiff's payment at any
11 point in the future following submission of a request and evidence of her ticket purchase.

12 Prudential ripeness does not apply here. The Ninth Circuit has acknowledged that the
13 prudential ripeness doctrine was created to avoid premature court interference in the business of
14 administrative agencies and has declined to extend the doctrine to apply in cases involving
15 private contracts. *Golden v. California Emergency Physicians Med. Group*, 782 F.3d 1083, 1087
16 (9th Cir. 2015). ANA is not an administrative agency and Plaintiff's state law claims are based
17 upon ANA's contractual obligations to provide refunds under its Conditions of Carriage. To the
18 extent Plaintiff contends her claims seek pre-enforcement of DOT policies mandating refunds,
19 enforcement is solely at the discretion of the Aviation Enforcement Office and neither the DOT
20 Notice nor the FAQs affords Plaintiff a private right of action to enforce DOT policies.
21 Furthermore, the FAQs plainly state that both the Notice and FAQs were not intended to have
22 "the force and effect of law" and were not meant to bind airlines in any way. *See* FAQs, No. 1.
23 In any event, ANA's refund policy is in line with both the DOT Notice and FAQs, as ANA has
24 not failed to honor its refund policy or disregarded its obligation to offer refunds following
25 cancellation of flights. (Ito Decl. ¶¶ 27-29).

B. ANA's Compliance With Its Own Conditions of Carriage and DOT Guidelines in Response to COVID-19 Renders Claims of Putative Class Members Moot

ANA has actively provided refunds within seven days when requested by passengers in

1 accordance with its Conditions of Carriage and its refund policy posted on its website. ANA has
 2 instructed its authorized agents to do the same. Accordingly, any claims by putative class
 3 members for denial of refund claims are moot. Mootness deprives a court of jurisdiction over an
 4 issue. *Johnson v. Cala Stevens Creek/Monroe, LLC*, 401 F.Supp. 3d 904, 909 (N.D. Cal. 2019).
 5 A case is moot when there is nothing for the court to remedy, even if it were inclined to provide
 6 one. *Spencer v. Kemna*, 523 U.S. 1, 18 (1998). A case can “become moot” when “an opposing
 7 party has agreed to everything the other party has demanded.” *GCB Commc'ns, Inc. v. U.S. S. Commc'ns, Inc.*, 650 F.3d 1257, 1267 (9th Cir. 2011).

9 ANA has complied with the DOT Notice, FAQs and 14 CFR § 259.5(b)(5)⁵ and, at the
 10 time of the alleged incident, had in place and adhered to its refund policy that provided prompt
 11 refunds when requested by passengers who have provided documentation of the purchase of their
 12 tickets for the cancelled flight, and has instructed its authorized travel agents to do the same. (Ito
 13 Decl. ¶ 28). Article 13 of ANA’s Conditions of Carriage require the refund to be “in the amount
 14 equal to the fare paid,” which is what is demanded by the members of the class. (See Conditions
 15 of Carriage, Exh. B to Ito Decl.). Prior to filing this motion, at least 78,770 refunds of U.S
 16 issued tickets have been processed. (Ito Decl. ¶ 29). This demonstrates ANA’s compliance with
 17 both its contractual obligations and is in line with DOT regulations. Accordingly, Plaintiff’s
 18 claims and the claims of the putative class are moot and there is no basis for Plaintiff’s class
 19 action.

20 **II. PLAINTIFF HAS NOT PLED SUFFICIENT FACTS TO STATE A CLAIM FOR
 21 RELIEF PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL
 22 PROCEDURE**

23 Rule 12(b)(6) dismissal is proper where a complaint fails to allege sufficient facts “to
 24 support a cognizable legal theory.” *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d
 25 1156, 1159 (9th Cir. 2016). In contrast to the evidence standard in evaluating Rule 12(b)(1) and
 26 (2) motions, the court must accept all of the factual allegations in the complaint and view facts in

27
 28 ⁵ The FAC has alleged that the DOT Notice and FAQs are not “merely guidance documents”
 because they are based on provisions of the Code of Federal Regulations cited in the FAQs.
 (FAC, ECF No. 15, ¶ 5). However, 14 CFR § 259.5(b)(5) is the only regulation cited in the
 FAQs that discusses an air carrier’s obligation to provide a refund.

1 the light most favorable to plaintiff. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (2007).
 2 However, courts are not bound to accept as true allegations that are legal conclusions, even if
 3 cast in the form of factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). A court may
 4 also consider “material which is properly submitted as part of the complaint” on a motion to
 5 dismiss. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). If the documents are not
 6 physically attached to the complaint, they may be considered if authenticity of the documents is
 7 not contested and the plaintiff’s complaint relies on the document. *Id.* Here, ANA’s Conditions
 8 of Carriage may be considered by the Court in connection with ANA’s motion to dismiss
 9 because Plaintiff’s Complaint incorporates and relies on the document. (FAC, ECF No. 15, ¶
 10 13).

11 **A. Plaintiff’s Claims are Related to ANA’s Rates and Services and Therefore
 12 are Preempted by the Airline Deregulation Act**

13 The Airline Deregulation Act (ADA), 49 U.S.C. § 1305 (*reenacted at* 49 U.S.C. § 41713)
 14 was enacted by Congress in 1978 to deregulate the airline industry. In doing so, Congress’ intent
 15 was to help ensure transportation rates, routes and services that reflect “maximum reliance on
 16 competitive market forces,” thereby stimulating “efficiency, innovation and low prices,” as well
 17 as “variety and quality...of air transportation services.” *Morales v. Trans World Airlines, Inc.*,
 18 504 U.S. 374, 378 (1992). To that end, a preemption provision was included in the ADA that
 19 prohibited “states from enforcing any law ‘*relating to rates, routes or services*’ of any air
 20 carrier.” *Id.* at 378-389 (*emphasis added*). The purpose of the preemption provision is “to ensure
 21 that the States would not undo federal deregulation with regulation of their own.” *Id.*
 22 Explaining the ADA’s phrase “relating to rates, routes, or services,” the Supreme Court noted
 23 that this language expresses “a broad pre-emptive purpose.” *Id.* at 383. Therefore, a law “relates
 24 to” prices if it has a “connection with or reference to” that subject and may apply even where the
 25 connection “is only indirect.” *See id.* at 384; *see also Hingson v. Pacific Southwest Airlines*, 743
 26 F.2d 1408, 1415 (9th Cir. 1984); *Ill. Corp. Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751, 754
 27 (7th Cir. 1989) (explaining “relating to” language “substantially increases the extent of
 28 preemption.”); *All World Professional Travel Services, Inc. v. American Airlines, Inc.*, 282 F.
 Supp. 2d 1161, 1169 (C.D. Cal. 2003) (“A claim relates to airline prices if the claim expressly

1 refers to price or has a significant economic effect upon price.”).

2 A narrow exception was delineated in *Wolens* for state law claims that were “too tenuous,
 3 remote, or peripheral” to be preempted by the ADA. *American Airlines, Inc. v. Wolens*, 513 U.S.
 4 219, 223-224 (1995). In doing so, the Court found that while the ADA preempted the use of the
 5 Illinois Consumer Fraud and Deceptive Practices Act (“ICFDPA”) to challenge the airline’s
 6 retroactive devaluation of frequent flyer miles, the ADA did not preempt passengers’ breach of
 7 contract claims. The Court reasoned that “terms and conditions airlines offer and passengers
 8 accept are not privately-ordered obligations” akin to a state’s enactment, enforcement of any law
 9 or “other provision having the *force and effect of the law*” (*emphasis added*). *Id.* at 228-229.
 10 Thus, where a state law claim sought recovery from an airline’s alleged breach of its “own, self-
 11 imposed undertaking,” recovery would not be preempted. *Id.*

12 Notably, the *Wolens* exception is narrow and breach of contract claims may still be
 13 preempted under the ADA. In *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, (2014), the Supreme
 14 Court elaborated that even where the state law claim was based on an airlines’ breach of self-
 15 imposed contractual obligations, recovery may still be preempted if the state law claim “sought
 16 to enlarge the contractual obligations that the parties voluntarily adopt.” *Ginsberg* at 276. The
 17 underlying analysis regarding ADA preemption is the effect of the state law, regulation or
 18 provision rather than its form as “the ADA’s deregulatory aim can be undermined just as surely
 19 by a state common-law rule as it can by a state statute or regulation.” *Id.* at 283.

20 Here, all of Plaintiff’s claims are premised upon her entitlement to a refund of her
 21 canceled flight and therefore directly relate to ANA’s rates and services. The very act of
 22 refunding tickets is a service that ANA provides to its passengers in order to remain competitive
 23 amongst its peers in the airline industry. It is also generally accepted that refund policies are
 24 related to rates as such policies will typically impact the prices of tickets. *See Statland v.*
 25 *American Airlines, Inc.* 998 F.2d 539, 542 (7th Cir. 1993) (where the Court “[thought] it obvious
 26 that canceled ticket refunds relates to rates” and Statland’s state law claims were therefore
 27 “swept aside.”); *see also Howell v. Alaska Airlines, Inc.* 99 Wash. App. 646, 652-653 (Wash.
 28 App. 2000) (Alaska Airlines refusal to refund the price of a nonrefundable ticket was preempted

1 by the ADA); *Buck v. American Airlines, Inc.*, 476 F.3d 29, 36 (1st Cir. 2007) (claim for refund
 2 of taxes and fees added to airfare was preempted because it related to “price”).

3 There is no exception for Plaintiff’s breach of contract claim under *Wolens*. As above,
 4 where the purported breach of contract claim attempts to enlarge or enhance the parties’ bargain
 5 based on policies outside the agreement, it is preempted by the ADA. *Ginsberg*, 572 U.S. at 276.
 6 While ANA undertook a “self-imposed obligation” to provide refunds to Plaintiff pursuant to
 7 Article 13 of its Conditions of Carriage, ANA included a provision that required Plaintiff to
 8 provide evidence she was entitled to a refund prior to disbursing the funds for her ticket. If
 9 Plaintiff’s breach of contract claim were allowed to proceed without an allegation that Plaintiff
 10 requested a refund from ANA (which Plaintiff cannot make, as she has affirmatively alleged that
 11 she never spoke to an ANA representative), the Court would be reading a requirement into the
 12 contract that ANA could be required to provide *automatic* refunds to passengers without a
 13 request. Allowing for rescission would similarly permit passenger to rescind contracts any time
 14 a flight was cancelled or delayed to circumvent refund policies they dislike. This would
 15 effectively expand ANA’s obligations, directly impacting ANA’s rates and services, frustrating
 16 the ADA’s goal of economic deregulation by interfering with the forces of competition. See
 17 *Watson v. United Airlines*, CIVIL 16-00400 LEK-KJM, 2017 WL 6060173 (D.Haw. Apr. 4,
 18 2017) *5 (ADA preempted breach of contract claim and remedy of rescission, among other
 19 claims, where plaintiff contended airline’s checked baggage policy was not properly disclosed).

20 To the extent Plaintiff purportedly relies on the DOT Notice and FAQs to substantiate
 21 this interpretation of ANA’s refund policy, neither document was part of the Conditions of
 22 Carriage that Plaintiff entered into when she purchased her tickets in November 2019. Even if
 23 they were, neither document contains guidelines that require ANA to provide refunds
 24 *automatically* and without substantiation. Furthermore, the FAQs explicitly state that both the
 25 Notice and FAQs are meant only to provide guidance and do not have the “force and effect of
 26 law.” Plaintiff’s breach of contract claim mischaracterizes the DOT’s guidance that the Notice
 27 and FAQs are explicitly “not meant to bind the regulated authorities in any way” as plenary
 28 authority to expand ANA’s self-imposed undertakings under its Conditions of Carriage to require

1 automatic refunds.

2 Taken together, all of Plaintiffs' claims relate to ANA's rates and services. Therefore,
 3 Plaintiff's claims are completely preempted by the ADA. Plaintiff has failed to state any claim
 4 for relief, and the Complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules
 5 of Civil Procedure.

6 **B. Plaintiff Has Failed to Plead That She Satisfied a Mandatory Condition
 7 Precedent to Receipt of a Refund**

8 As separate and independent basis for dismissal of the FAC, Plaintiff fails to plead facts
 9 sufficient to state a claim for relief. As alleged in the FAC, ANA enters into contracts with its
 10 passengers through its Conditions of Carriage (FAC, ECF No. 15, ¶ 37). This express contract
 11 includes a condition precedent to ANA's disbursement of a refund that was artfully omitted from
 12 the original Complaint and the FAC, namely, the requirement that the passenger provide
 13 evidence that she is entitled to a refund. Without pleading that she satisfied this condition
 14 precedent, Plaintiff fails to state a claim for breach of contract that warrants relief.

15 Under California law, a condition precedent is one "which is to be performed before
 16 some right dependent thereon accrues, or some act dependent thereon is performed." CAL. CIV.
 17 CODE § 1436 (West 2020). Courts will honor such conditions where the language of the contract
 18 clearly requires such a construction. *See Helzel v. Superior Court*, 123 Cal. App. 3d 652, 633
 19 (Cal. Ct. App. 1981). Where such conditions are deemed to be present, it is "elementary a
 20 plaintiff suing for breach of contract must prove it has performed all conditions on its part or that
 21 it was excused performance." *Consolidated World Investments Inc. v. Lido Preferred Ltd.*, 9
 22 Cal. App. 4th 373, 380 (Cal. Ct. App. 1992).

23 The condition precedent to ANA's disbursement of a refund is stated clearly under
 24 Article 13(B)(1) of the Conditions of Carriage: "ANA will make a refund to the person named in
 25 a Ticket or, to the person who purchased the Ticket *upon presentation to ANA of satisfactory*
evidence to prove that he/she is entitled by these Conditions of Carriage to such refund."
 26 (*emphasis added*). The language of this condition is clear and states unequivocally that ANA
 27 will not provide a refund without a passenger's submission of satisfactory evidence. Plaintiff has
 28 failed to allege any facts to indicate that she fulfilled her own contractual obligations by

1 providing evidence to ANA that would enable it to process Plaintiff's refund. Instead, Plaintiff
 2 omits this portion of the Conditions of Carriage from her allegations and fails to address the
 3 condition. ANA is not obligated under the Conditions of Carriage to provide a refund to Plaintiff
 4 until Plaintiff has performed the condition precedent and the requisite evidence is received by
 5 ANA. Therefore, Plaintiff has failed to state a claim for breach of contract.

6 To the extent that Plaintiff contends that ANA owed an extra-contractual obligation to
 7 Plaintiff to provide Plaintiff a refund under DOT Notice and FAQs pursuant to the incorporation
 8 of both authorities under Article 8 and 18 of its Conditions of Carriage, the DOT specifically
 9 noted its guidelines were "not meant to bind the regulated entities in any way." Regardless,
 10 Plaintiff has not pled any facts to suggest that either document required ANA to provide
 11 automatic refunds as soon as flights were canceled. Similarly, though Plaintiff alleged
 12 "provisions of the Code of Federal Regulations...cited explicitly in the DOT Second Notice"
 13 mandated air carriers provide prompt refunds, the only cited regulation regarding air carrier's
 14 obligations, 14 CFR §259.5(b)(5), states that prompt refunds must be provided "after receiving a
 15 complete refund request." (FAC, ECF No. 15, ¶ 5). Neither the DOT guidance nor the Code of
 16 Federal Regulations require refunds to be issued without receiving a request for a refund or
 17 documentation from the passenger evidencing their ticket purchase. As such, Plaintiff has failed
 18 to state a claim for breach of contract claim premised upon ANA's Conditions of Carriage or
 19 allegedly imputed contractual duties from the DOT Notice and FAQs.

20 **C. Plaintiff Is Not Entitled to the Remedy of Rescission As a Matter of Law**

21 Rescission is a restitutionary remedy available as an alternative to an action for damages
 22 that restores both parties to their statuses prior to entering the contract where there has been
 23 repudiation or a material breach of a contract. *See Ambassador Hotel Co., Ltd. v. Wei-Chuan*
Investment, 189 F.3d 1017, 1031 (9th Cir. 1999); *see also Alder v. Drudis*, 30 Cal.2d 372, 383
 24 (Cal. 1947). The grounds for rescission are set out in California Civil Code §1689 and include,
 25 among others, if the contract is unlawful and the parties are not equally at fault or if the
 26 consideration for the obligation of the rescinding party: (1) fails, in whole or in part through the
 27 fault of the other party, (2) becomes entirely void, (3) fails in a material respect from any cause.
 28

1 CAL. CIV. CODE § 1689 (b)(2)-(7) (West 2020). Notably, failure of consideration is based not on
 2 facts existing at the time the mutual promises were bargained for, but on a fact or contingency
 3 that occurs sometime after the contract was made which results in material failure of
 4 performance by one party. *Taliaferro v. Davis*, 216 Cal.App.2d 398, 411 (1st Dist 1963). In this
 5 way, it is similar to the doctrine of commercial frustration, and typically occurs when a
 6 supervening event totally or nearly totally destroys the value of counter-performance in a
 7 contract. *Lloyd v. Murphy*, 25 Cal.2d 48, 53-54 (Cal. 1944). Where the parties have contracted
 8 with reference to the frustrating event or have contemplated the risks arising from it, they may
 9 not invoke the doctrine of frustration to escape their obligations. *Id.* at 55; *see also Glenn R.*
 10 *Sewell Sheet Metal, Inc. v. Loverde*, 70 Cal.2d 666, 676 (Cal. 1969).

11 Here, Plaintiff has alleged that rescission is warranted because ANA failed in
 12 consideration for her obligation, payment of her fare, when ANA cancelled and “otherwise did
 13 not provide the flight.” (FAC, ECF No. 15, ¶ 50). This allegation narrowly defines ANA’s
 14 consideration for Plaintiff’s fare as the ticketed flight rather than as the *promise* of the ticketed
 15 flight subject to the terms of its Conditions of Carriage in an attempt to circumvent Plaintiff’s
 16 obligations under ANA’s refund policy. As such, Plaintiff is not entitled to the remedy of
 17 rescission.

18 **1. ANA’s Cancellation of Plaintiff’s Return Flight Does Not Constitute
 19 Failure of Consideration**

20 “A failure of consideration is the failure to execute a promise, the performance of which
 21 has been exchanged for performance by another party.” *FPI Development, Inc. v. Nakashima*,
 22 231 Cal.App.3d 367, 398 (1991). Here, ANA’s consideration in exchange for Plaintiff’s fare
 23 was the promise of carriage in accordance with its Conditions of Carriage. In response to the
 24 global pandemic, ANA “suspended service” on certain international routes, including Plaintiff’s
 25 return flight. (FAC, ECF No. 15, ¶ 8). However, ANA did not, at any time, indicate it would
 26 not perform its obligations under the Conditions of Carriage to provide alternative transportation
 27 or a refund. The opposite is true: in accordance with Article 12 of its Conditions of Carriage,
 28 which anticipates the occurrence of cancellation due to “any fact beyond ANA’s control,” and
 Article 13, which outlines the criteria for involuntary refunds, ANA has issued at least 78,770

1 refunds for tickets issued in the United States to passengers for flights canceled due to the
 2 pandemic. (Ito Decl. ¶ 29).

3 At most, ANA's failure to provide a refund to Plaintiff could be characterized as a delay
 4 in performance contingent on Plaintiff's performance of the condition precedent, *i.e.*, submission
 5 of proof of her fare under Article 13(B). Unless the contract declares time to be of the essence,
 6 delay in performance is not a material failure of consideration as performance within a
 7 reasonable time is sufficient. *See CAL. CIV. CODE § 1657 (West 2020); Baypoint Mortgage*
 8 *Corp. v. Crest Premium Real Estate etc. Trust*, 168 Cal.App.3d 818, 825-826 (2d Dist. 1985).
 9 The FAC does not allege that the Conditions of Carriage indicate timing is of the essence for
 10 refunds. Furthermore, provided Plaintiff did not perform her obligations by following Article
 11 13(B), ANA's performance within a reasonable time under CAL. CIV. CODE § 1657 is excused
 12 until Plaintiff's submission of proof of fare. *City of Stockton v. Stockton Plaza Corp.*, 261
 13 Cal.App.2d 639 (1968). Plaintiff is therefore not entitled to rescission for any alleged delay in
 14 performance by ANA.

15 **2. Plaintiff Cannot Contravene Express Terms of ANA's Conditions of**
Carriage by Attempting to Rescind the Contract

16 Anticipating various reasons that might warrant cancellation of flights, ANA, like other
 17 air carriers, includes provisions that list such situations and passengers' remedies in such an
 18 event. (See Conditions of Carriage Article 12 and Article 13, Exhibit B to Ito Decl.). This is, in
 19 part, to avoid intervening events from frustrating the purpose of the contract and discharging
 20 parties from their respective obligations. It is settled that if parties have contracted with
 21 reference to contemplated risks, they may not invoke the doctrine of frustration to escape their
 22 obligations. *Gold v. Salem Lutheran Home Ass'n of Bay Cities*, 53 Cal.2d 289 (1959). Allowing
 23 Plaintiff to rescind the contract effectively bars ANA from enforcing contractual terms ANA
 24 specifically included contemplating the risk of intervening events. Indeed, other jurisdictions
 25 have considered claims for rescission based upon flight cancellation "incomprehensible." *See*
 26 *Egan v. Kollsman Instrument Corp.*, 253 N.Y.S.2d 679, 681 (1964) (where airline's ticket
 27 contained rules that provided absolute right to make cancellations due to weather conditions,
 28 plaintiff's argument that airline nonetheless breached the agreement and therefore plaintiff was

1 entitled to refund was nonsensical).

2 There has been no refusal or failure on ANA's part to perform under its Conditions of
 3 Carriage and provide a refund. ANA has no obligation under the contract to provide Plaintiff
 4 with a refund unless and until Plaintiff performs the condition precedent and submitted proof of
 5 her damages pursuant to Article 13(B). The FAC has included no facts that indicate Plaintiff has
 6 done so. In essence, the rescission claim is Plaintiff's misguided attempt to circumvent her
 7 obligations under the Conditions of Carriage. This is an inappropriate attempt to rescind the
 8 contract.

9 **3. The FAC Pleads No Facts Substantiating Its Claim that ANA's
 10 Conditions of Carriage was Rendered Unlawful**

11 Plaintiff alternatively argues that ANA's consideration failed pursuant to § 1689(b)(7) of
 12 the Civil Code because it was "unlawful pursuant to government-ordered restrictions on travel."
 13 (FAC, ECF No. 15, ¶ 51). However, the FAC failed to state what government-ordered
 14 restrictions on travel rendered ANA's operation of flights unlawful. The FAC similarly failed to
 15 indicate what government ordered restrictions on travel rendered ANA's consequent cancellation
 16 of flights unlawful. To the extent the FAC asserted any facts regarding government restrictions
 17 or regulations, they are limited to the DOT's enforcement notice regarding air carrier's
 18 obligations to provide refunds and the few sections of the Code of Federal Regulations regarding
 19 the same. (FAC, ECF No. 15 ¶¶ 3-5). None of these are "government-ordered restrictions on
 20 travel." ANA, like many airlines, intentionally include particular provisions to address
 21 cancellation of flights for various reasons including where necessary for public safety. The FAC
 22 included no facts that indicate why such provisions might be considered unlawful or why
 23 cancellation of flights for such reasons would be deemed unlawful. Based on the foregoing,
 24 even if Plaintiff's FAC is not dismissed for lack of subject matter jurisdiction or preemption by
 25 the ADA, Plaintiff has failed to plead sufficient facts to substantiate any of the alleged claims
 26 against ANA and the FAC should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of
 27 Civil Procedure.

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4. Plaintiff Cannot Recover Both Damages And a Restitutionary Remedy For the Same Alleged Injury

When rescission is merely an assertion by the injured party that the other has committed a vital breach that excuses himself from further performance, Plaintiff has the option of: (1) making the identical assertions and seeking damages *instead of* restitution or (2) seek damages or restitution *in the alternative*. *See Crofoot Lumber Inc. v. Thompson*, 163 Cal.App.2d 324, 332 (1958). Here, Plaintiff inappropriately alleges damages under breach of contract *in addition to* a restitutive remedy in the form of rescission. (FAC, ECF No. 15, Prayer for Relief ¶¶ (b), (d)). Therefore, in addition to the FAC’s failure to state facts sufficient to state a claim for rescission, Plaintiff is estopped from simultaneously seeking both causes of action pursuant to the doctrine election of remedies.

III. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION OVER ANA PURSUANT TO RULE 12(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Personal jurisdiction refers to the court's power to render judgment that either commands defendant's obedience or imposes obligations on the defendant that will be enforced by other courts. *See Burnham v. Sup. Ct.*, 495 U.S. 604, 609-610 (1990). The primary concern in assessing personal jurisdiction is the burden on the defendant, and it necessitates consideration of both the practical issues imposed on defendant to litigate in the forum as well as the submission of defendant to "the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 1780 (2017).

Federal courts ordinarily follow state law in determining the bounds of their jurisdiction and California's long-arm statute permits California state courts to exercise personal jurisdiction on any basis not inconsistent with the California or United States Constitution. *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014). Following *International Shoe*, where a plaintiff sought to establish personal jurisdiction over a foreign corporation, the plaintiff could establish either specific jurisdiction or general jurisdiction. See *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement et. al.*, 326 U.S. 310, 318 (1945). Specific jurisdiction is established where the action arises out of or relates to defendant corporation's

1 contacts with the forum whereas general jurisdiction is established in the corporation's domicile
 2 or any forum in which the corporation "is fairly regarded as at home." *Bristol-Myers*, 137 S.Ct.
 3 at 1780. A court with general jurisdiction may hear any claim against the defendant, even if all
 4 the incidents underlying the claim occurred in a different state; however, only a limited set of
 5 affiliations with a forum renders a defendant amenable to general jurisdiction in the state. *Id.*

6 Plaintiff bears the burden of proof on the necessary jurisdictional facts and must establish
 7 a prima facie case; then, the burden shifts to defendant to demonstrate that exercise of personal
 8 jurisdiction would not be reasonable. *In re Western States Wholesale Natural Gas Antitrust*
 9 *Litigation*, 715 F.3d 716, 741 (9th Cir. 2013). A prima facie showing requires Plaintiff to
 10 produce admissible evidence which, if believed would be sufficient to establish personal
 11 jurisdiction. *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122,
 12 1129 (9th Cir. 2003). Where a Rule 12(b)(2) motion challenges the facts supporting plaintiff's
 13 theory of jurisdiction, the motion must be decided on the basis of competent evidence, including
 14 declarations. *Data Disc, Inc. v. Systems Tech, Assocs. Inc.*, 557 F.2d 1280, 12 89 (9th Cir.
 15 1977).

16 **A. Plaintiff's FAC Fails to Allege Any Facts Establishing Specific Jurisdiction
 17 over ANA in California**

18 The Ninth Circuit utilizes a three-part test to determine whether there is specific
 19 jurisdiction over a claim: (1) the non-resident defendant must purposefully direct his activities or
 20 consummate some transaction with the forum or resident thereof or perform an act by which he
 21 purposefully avails himself of the privilege of conducting activities in the forum; (2) the claim
 22 must arise out of or result from defendant's forum-related activities and (3) exercise of
 23 jurisdiction must comport with fair play and substantial justice. *Freestream Aircraft Ltd. v. Aero*
 24 *Law Group*, 905 F.3d 597 (9th Cir. 2018). The purposeful availment prong of the test requires a
 25 qualitative evaluation of the defendant's contact with the forum state in order to determine
 26 whether defendant's conduct and connection with the forum State are such that defendant should
 27 reasonably anticipate being hauled into court there. *World-Wide Volkswagen Corp. v. Woodson*,
 28 444 U.S. 286, 297 (1980). The purposeful availment requirement is met if the defendant
 "performed some type of affirmative conduct which allows or promotes the transaction of

1 business within the forum state.” *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir.1990)

2 Here, though Plaintiff argues that ANA purposefully availed itself in this forum by
 3 maintaining a California office and operating routes in and out of the state, the FAC fails to
 4 allege that her claim arose or resulted from ANA’s conduct in California. (FAC, ECF No. 15, ¶
 5 22). As set forth above, Plaintiff did not allege that she conducted any business with ANA in
 6 California and affirmatively alleged that she purchased her tickets from ASAP, not ANA. (FAC,
 7 ECF No. 15, ¶¶ 9, 19). Plaintiff did not identify the location of ASAP or allege that any business
 8 was conducted between ANA and ASAP in California. The only allegation alluding to ANA’s
 9 conduct in California giving rise to Plaintiff’s claim is the fact her cancelled return flight was to
 10 be operated from Tokyo to San Francisco. (FAC, ECF No. 15, ¶ 8). However, any connection
 11 between Plaintiff’s claim and ANA’s conduct is too attenuated to confer specific personal
 12 jurisdiction. Plaintiff’s claim did not result from ANA’s operation of flights, but rather from
 13 ANA’s alleged refusal to provide a refund. No refund-related activity was alleged to have
 14 occurred in California. The allegations in the FAC are insufficient to establish that this Court
 15 has personal jurisdiction to adjudicate Plaintiff’s claims against ANA.

16 Furthermore, even if Plaintiff could establish specific personal jurisdiction over ANA for
 17 her claim based on ANA’s interactions with her in California, this would not be sufficient to
 18 establish specific jurisdiction over ANA for class members whose claims have no connection to
 19 California. A defendant’s relationship with a resident plaintiff in the forum State, standing
 20 alone, is an insufficient basis to establish similar claims brought by non-resident plaintiffs.

21 *Bristol-Myers*, 137 S. Ct. at 1781.

22 In *Bristol-Myers*, more than 600 plaintiffs, most of whom were not California residents,
 23 filed state-law claims based on injuries allegedly caused by Defendant Bristol-Meyers Squibb’s
 24 (“BMS”) drug Plavix. *Id.* at 1778. Personal jurisdiction was established in California over non-
 25 resident BMS due to BMS’ extensive longstanding business activities in California relating to
 26 Plavix, including, in particular, sale of 196 million Plavix pills between 1998 and 2006 and
 27 nearly \$1 billion worth of Plavix between 2006 and 2012 in California. *Id.* Nevertheless,
 28 following review by the U.S. Supreme Court, the non-resident actions on the same claims were

1 dismissed for lack of personal jurisdiction. *Id.* at 1783. In its decision, the Court noted that non-
2 residents were not prescribed Plavix in California, did not purchase it there and were not injured
3 by it there; therefore, the requisite link between the forum and the specific claims was missing.
4 *Id.* at 1781. Similarly here, members of the class that reside outside of California will have
5 purchased ANA tickets from different online vendors outside of California and may or may not
6 have interacted with ANA representatives outside of California, but if none of these actions were
7 performed within California, there is no specific jurisdiction over ANA in California for those
8 passengers.

B. ANA Is Domiciled and Maintains Its Principal Place of Business in Japan and Plaintiff has Failed to Establish that ANA's Contacts in California are Pervasive Enough to Establish General Jurisdiction

1 In *Daimler A.G. v. Bauman*, 571 U.S. 117, 118 (2014), the Supreme Court held that
2 although the exceptional case may exist, the “paradigm all-purpose forums” for general
3 jurisdiction are a corporation’s place of incorporation and principal place of business. In
4 *Daimler*, the Supreme Court rejected the plaintiffs’ argument that general jurisdiction is
5 appropriate whenever a corporation “engages in a substantial, continuous, and systematic course
6 of business” in a state. *Id.* The *Daimler* Court emphasized that the “paradigm” fora for general
7 jurisdiction are a corporation’s place of incorporation and principal place of business. *Id.* Only in
8 an “exceptional case” will general jurisdiction be available elsewhere. *Id.* at fn. 19.

19 Post-*Daimler* cases confirm that an airline is not subject to general jurisdiction in
20 jurisdictions where the airline is not incorporated and does not maintain its principal place of
21 business. In *Banks v. American Airlines*, plaintiff, a flight attendant, brought action against her
22 employer, American Airlines (“American”), in California alleging racial discrimination. *Banks*
23 *v. American Airlines*, 2019 WL 5579479 (N.D. Cal. 2019). American was neither incorporated
24 nor had its principal place of business in California and the *Banks* court was not persuaded that
25 there was general jurisdiction simply because American had a “huge hub” in California. *Id.* at 3.

26 Similarly in *Agher v. Envoy Air Inc.*, plaintiff sued American for wrongful termination
27 and the court held that plaintiff had not met its burden of showing general jurisdiction despite
28 allegations that “16% of American’s flights involve departures from or arrivals in California”

1 and approximately 8,500 American employees were based in California. *Agher v. Envoy Air*
 2 *Inc.*, 2018 WL 6444888 at 1 (C.D. Cal. 2018). Neither allegation was sufficient to demonstrate
 3 American was “at home” in the State. *Id.*

4 ANA is organized under the laws of Japan and maintains its principal place of business in
 5 Japan. (Ito Decl. ¶ 4). While ANA operates flights in and out of California, these routes
 6 represent under three percent of ANA’s business. (Ito Decl. ¶ 6). Similarly, although ANA has
 7 two offices in California with approximately 240 employees, this is nominal compared to the
 8 many offices and employees ANA manages worldwide. (Ito Decl. ¶¶ 7-8). Accordingly, ANA
 9 respectfully requests the Court to dismiss the action pursuant to Rule 12(b)(2) of the Federal
 10 Rules of Civil Procedure, as Plaintiff has failed to establish that this Court may exercise personal
 11 jurisdiction over ANA.

12 **CONCLUSION**

13 For the foregoing reasons, Defendant All Nippon Airways respectfully requests the Court
 14 grant its motion and dismiss Plaintiff’s Complaint in its entirety.

16 Dated: August 17, 2020

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